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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY N. FAULK,

Defendant and Appellant.

H037333

(Santa Clara County

Super. Ct. No. C1087170)

Defendant Gregory N. Faulk appeals a judgment of conviction following a jury trial during which he was found guilty of carjacking (Pen. Code, § 215), unlawful taking of a car (Veh. Code, §10851, subd. (a)), and second degree burglary (Pen. Code, § 459-460, subd. (b)).

On appeal, defendant asserts the judgment must be reversed because he was denied effective assistance of counsel during trial, because his counsel did not request a modification of CALCRIM No. 350. In addition, defendant asserts that the court improperly imposed a five-year enhancement for each of his three prior serious felony convictions.

STATEMENT OF THE FACTS AND CASE

In the fall of 2010, defendant was homeless and went to the Hayes Mansion hotel in San Jose to look for shelter. There, he broke into the spa on the property by making holes in the wall of the hotel gym, and reaching in to unlock the door to the spa. When

the hotel staff arrived at the spa in the morning of September 4, 2010, they discovered defendant inside. Defendant ran out of the spa and through the hotel parking lot, eventually jumping a wrought iron fence into a condominium or apartment complex.

A few hours later, Huong Ho was at her parent's condominium complex to check her mail. She parked her Mercedes next to the mailboxes. Ho tried to open her mailbox, but was unsuccessful. Ho saw defendant standing near the mailboxes, and began talking to him. Defendant told her he was the building manager and that he had a master key to the mailboxes at his house. Defendant told Ho that he would open her mailbox if she drove him to his house so he could get his master key. Ho agreed, and defendant got into her car and gave Ho directions of where to go. As Ho slowed down to stop her car where defendant directed, defendant suddenly punched her in the eye, and ordered her to get out of the car. Ho got out of the car, leaving her cell phone, purse, and shoes in the car. Defendant sped away in Ho's car. Ho called the police using a phone of a nearby resident. When the police arrived, she gave a description of defendant, and the police photographed the injury to her eye.

Defendant abandoned Ho's car almost immediately after driving away. He then took a 1992 Toyota belonging to Trong Nguyen from 44 South Terrace Court. Defendant abandoned the Toyota in a parking lot of a shopping center on Monterey Highway near Blossom Hill Road. Defendant used money from Ho's wallet to buy clothes at Walmart and Walgreen's. Defendant changed his clothes in the bathroom of the Walmart and a nearby Taco Bell. Police later found Ho's wallet in the Taco Bell bathroom, and arrested defendant at a nearby bus stop. Following his arrest, defendant's blood tested positive for methamphetamine.

Defendant testified in his own defense at trial. He essentially admitted all of the alleged crimes; however, he claimed he never punched Ho, and did not use any force in taking her Mercedes. In addition, defendant said that Ho asked him if he could get her

some methamphetamine, and agreed to drive him to a location where he could find the drug. The two then smoked methamphetamine together in the car, and when Ho got out of the car to put her pipe into the trunk, defendant slid into the driver's seat and drove away in Ho's car. Defendant said when he took the car, there was no injury to Ho's eye.

In addition to his own testimony, defendant called several witnesses at trial who testified that he was not a violent person.

In February 2011, defendant was charged by information with carjacking (Pen. Code, § 215; count 1), unlawful taking of a car (Veh. Code, §10851, subd. (a); count 2), and second degree burglary (Pen. Code, § 459-460, subd. (b); count 3). The information also alleged defendant had three prior strike and serious felony convictions, and that defendant had served a prior prison term. (Pen. Code, §§ 667, subds. (a)-(i), 1170.12; 667.5, subd. (b)).

In May 2011, a jury convicted defendant of counts 2 and 3, but hung on count 1. The court found the allegations of defendant's prior convictions true. A second trial on count 1 was held in July 2011 during which a jury found defendant guilty.

In August 2011, the court struck two of defendant's strike priors and sentenced defendant to 23 year 8 months in prison.

DISCUSSION

Defendant asserts the judgment must be reversed because he was denied effective assistance of counsel during trial. Specifically, he argues his counsel was ineffective because he did not request a modification of CALCRIM No. 350 to remove the language "evidence of defendant's good character may be countered by evidence of [his] bad character for the same trait." In addition, defendant asserts that the court improperly imposed a five-year enhancement for each of his three prior serious felony convictions.

Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, first, defendant must

establish that “ ‘counsel’s representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ [Citations.]” (*People v. Ledesma* (1987) 43 Cal.3d 171, 216, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 688.) However, “[a] reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.” (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) On direct appeal, where the record “does not show the reason for counsel’s challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation.” (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) In other words, defendant bears a burden that is difficult to carry on direct appeal. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) “[I]f the record sheds no light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation for counsel’s performance.” (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.)

Second, defendant must show prejudice. Specifically, defendant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland v. Washington, supra*, 466 U.S. at p. 694; *People v. Staten* (2000) 24 Cal.4th 434, 450-451.)

Finally, we note that we “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” (*Strickland v. Washington, supra*, 455 U.S. at p. 697.)

CALCRIM No. 350

Defendant asserts his counsel was ineffective, because he did not request removal of language contained in CALCRIM No. 350. The portion of the instruction at issue in this case is as follows: “Character of defendant: You have heard evidence testimony that the defendant has a character for non-violence. You may take that testimony into consideration along with all the other evidence. [¶] In deciding whether the People have proved the defendant’s character for non-violence can be itself a reasonable doubt. [¶] However, evidence of the defendant’s good character may be countered by evidence of his bad character for the same trait. You must decide the meaning and importance of the character evidence. . . .”

Defendant asserts on appeal that the sentence, “evidence of the defendant’s good character may be countered by evidence of his bad character for the same trait,” should have been removed from the instruction, because no bad character evidence was produced at trial. He further argues his counsel was ineffective for failing to request modification of the instruction to remove the bad character language.

Here, defendant cannot establish prejudice from his trial counsel’s failure to request removal of the language about bad character from the instruction. While it is true the prosecutor did not present any evidence of defendant’s bad character, and a request to remove the disputed portion of the instruction would surely have been granted by the court, counsel’s failure to request such removal did not prejudice defendant at trial. There was clear evidence of defendant’s use of force to steal Ho’s car to support the conviction for carjacking. Ho testified that defendant punched her in the eye before he sped away in the car. When the police arrived to interview Ho, they photographed the injuries to Ho’s eye, and the photographs were admitted into evidence, corroborating Ho’s testimony of being punched. Defendant’s self-serving statement that Ho was not injured when he took the car, and he had no idea how she was injured lacked credibility.

Based on the evidence at trial, there is no reasonable probability that the result in this case would have been different had defendant's counsel requested removal of the bad character language from the pinpoint instruction under CALCRIM No. 350.

Enhancements for Each of the Prior Serious Felony Convictions

Defendant asserts the trial court erred in imposing three five-year enhancements for his prior serious felony convictions. Defendant argues his sentence should be modified and reduced by five years, because two of the prior felony convictions were not "brought and tried separately," as is required for the separate enhancement under the statute. Penal Code section 667, subdivision (a), which provides in relevant part that, "any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."

In *In re Harris* (1989) 49 Cal.3d 131 (*Harris*), the California Supreme Court interpreted the phrase " 'brought and tried separately' " to mean "that the underlying proceedings must have been formally distinct, from filing to adjudication of guilt." (*Id.* at p. 136.) The *Harris* court reasoned that the phrase used in section 667, subdivision (a) must have the same meaning as similar language used in a predecessor habitual criminal statute which the court, in *People v. Ebner* (1966) 64 Cal.2d 297 (*Ebner*), had interpreted as meaning that the "prior felony proceedings must be totally separate, not only during proceedings before trial but also as to those leading to the ultimate adjudication of guilt." (*Id.* at p. 304.) "As explained in *Ebner*, there is 'no distinction between an adjudication of guilt based on a plea of guilt and that predicated on a trial on the merits.' " (*Harris, supra*, 49 Cal.3d at p. 135.) In *Harris*, the defendant had been charged in a single complaint with two counts of robbery. After he was held to answer, the district attorney

filed two separate informations, each charging a single count. The defendant pleaded guilty to each information and was sentenced on each information in the same proceeding. The *Harris* court ruled that because the charges were made in a single complaint, they were not “ ‘brought . . . separately,’ ” and therefore only one five-year enhancement should have been imposed. (*Id.* at p. 136.)

Defendant asserts that while his two prior serious felony convictions for first degree burglary (Pen. Code § 459), and unlawful driving (Veh. Code § 10851, subd. (a)) were originally brought under two separate felony complaints more than a year apart, they were disposed of together by a negotiated concurrent sentence after defendant waived preliminary hearing in both cases.

Defendant acknowledges that this court’s opinion in *People v. Gonzales* (1990) 220 Cal.App.3d 134 (*Gonzales*)) is contrary to his argument in this case. In *Gonzales*, we held that where convictions arise from unrelated counts or distinct accusatory pleadings and are not consolidated, the charges are “brought and tried separately” under section 667, subdivision (a), even if the defendant later negotiates a joint disposition for all of his or her separate cases, pleads guilty to all of them in a single proceeding, or is sentenced on his or her separate cases in a single proceeding. (*Gonzales, supra*, 220 Cal.App.3d 134, 144.) Thus, in *Gonzales* we held that calendaring all or some of a criminal defendant’s cases for the same date and time does not “effect a ‘de facto’ consolidation of cases.” (*Id.* at pp. 140-141.)

Despite this court’s holding in *Gonzales*, defendant asserts we should reach a different result here, because the circumstances of this case are “sufficiently distinguishable” from those in *Gonzales*. Defendant places particular importance on the fact that unlike *Gonzales*, here defendant was represented by the same counsel in both cases, the cases did not proceed with preliminary hearings, and no separate informations were filed in superior court. Defendant asserts that under the “totality of circumstances”

as discussed in *Gonzales*, his two cases were not “brought and tried separately” as required under Penal Code section 667, subdivision (a).

We do not view the difference in facts between the present case and *Gonzales* sufficient to necessitate a different result. We find no sentencing error in this case.

DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.